ATTORNEY FOR APPELLANT:

MICHAEL W. REED
Reed & Earhart Attorneys at Law, P.C.
Warsaw, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JESSICA A. MEEK
IAN McLEAN
Deputy Attorneys General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JERALD J. WOMACK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 43A03-0706-CR-251
	)	
STATE OF INDIANA	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0607-FD-174

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Jerald Womack appeals from his conviction for Class D felony Marijuana Possession,[1] the finding that he is a Habitual Controlled Substance Offender,[2] and his aggregate sentence of nine years. Womack raises the following issues, which we renumber and restate as follows:

I. Whether the warrantless search of Womack's vehicle violated the Fourth Amendment to the United States Constitution;

II. Whether the State produced sufficient evidence to establish that Womack constructively possessed marijuana found in his vehicle;

III. Whether the State produced sufficient evidence to establish that he had the required number of prior controlled substance convictions; and

IV. Whether Womack's nine-year aggregate sentence is appropriate.

Finding no reversible error, we affirm the judgment of the trial court.[3]

FACTS AND PROCEDURAL HISTORY

At approximately 10:59 p.m. on July 13, 2006, Kosciusko Sheriff's Deputy Richard Shepherd was on routine patrol in Warsaw when he noticed a brown station wagon, which failed to stop at a stop sign. Deputy Shepherd activated his vehicle's lights and began pursuit. After the station wagon appeared to pull over, it drove off again and Deputy Shepherd activated his siren. After three to five minutes, the brown station wagon pulled

[1] Ind. Code § 35-48-4-11 (2006).

[2] Ind. Code § 35-50-2-10 (2006).

into a residence at 601 East Prairie Street, with Deputy Shepherd following closely behind. By this time, Deputy Shepherd had determined that the station wagon was registered to Jerald Womack and Delores R. Womack. As Deputy Shepherd put his vehicle into parking gear, Womack opened the driver's-side front door of the station wagon and began to run around the house.

Although Deputy Shepherd lost visual contact with Womack, Winona Lake Police Officer Joseph Bumbaugh soon arrived with his K-9 unit and tracked Womack to a nearby woods, where he was apprehended. Meanwhile, Indiana State University student-intern Cory Fields, who was riding with Deputy Shepherd that night, had secured both of the vehicles in Womack's driveway. Fields had joined Deputy Shepherd in chasing Womack on foot before Deputy Shepherd sent him back to the front of the house after approximately three minutes. When he returned, Fields saw "a lady coming up the street towards our squad car[.]" Tr. p. 136. When the woman "started to go towards the car[,]" Fields told her not to approach it, and she "stopped and went towards the house." Tr. p. 136.

After Womack was taken into custody, Officer Bumbaugh returned to Womack's vehicle with his K-9 unit. Officer Bumbaugh's K-9 indicated the presence of illegal drugs on the floor in front of the driver's seat when it was allowed to smell the interior of Womack's station wagon. After indicating the presence of illegal drugs on the driver's side, the K-9

---

[3] We heard oral argument in this case on April 24, 2008, at Wawasee High School in Kosciusko County. We wish to commend counsel on the quality of their advocacy and extend our thanks to the students, staff, faculty, and administration of Wawasee High School and the Kosciusko County Bar Association for their hospitality.

indicated the presence of them in the glove compartment when it was allowed to smell the interior of the car on the passenger's side. Officer Bumbaugh found a cigarette box in the glove compartment, which was later determined to contain 0.91 grams of marijuana. Kosciusko County Sheriff's Corporal Kevin Gelbaugh found what appeared to be three partially smoked marijuana cigarettes, two on the driver's-side floor and one on the seat. At some point, Corporal Gelbaugh detected the odor of burnt marijuana coming from the interior of the station wagon.

On July 14, 2006, the State charged Womack with Class D felony resisting law enforcement and Class D felony marijuana possession and alleged that he was a habitual controlled substance offender. After a trifurcated trial, a jury found Womack guilty of Class A misdemeanor resisting law enforcement[4] and Class D felony marijuana possession and found that he was a habitual controlled substance offender. During the controlled substance offender phase, Martinsville Police Officer Jeffrey Buskirk affirmed that Womack was the same person convicted of marijuana delivery in cause number 55D02-9401-CF-8. The trial court sentenced Womack to one year of incarceration for resisting law enforcement and three years for marijuana possession, both sentences to be served concurrently, enhanced by six years by virtue of Womack's habitual controlled substance offender status.

DISCUSSION AND DECISION

I. The Search of Womack's Station Wagon

The admissibility of evidence is within the sound discretion of the trial court. *Curley*

v. State, 777 N.E.2d 58, 60 (Ind. Ct. App. 2002), *trans. denied* (2003). We will only reverse a trial court's decision on the admissibility of evidence upon a showing of an abuse of that discretion. *Id*. An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id*. The Court of Appeals may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court. *Moore v. State*, 839 N.E.2d 178, 182 (Ind. Ct. App. 2005), *trans. denied* (2006). We do not reweigh the evidence and consider the evidence most favorable to the trial court's ruling. *Hirsey v. State*, 852 N.E.2d 1008, 1012 (Ind. Ct. App. 2006), *trans. denied*.

As a general rule, the Fourth Amendment prohibits warrantless searches, but there are exceptions to the warrant requirement. *Black v. State*, 810 N.E.2d 713, 715 (Ind. 2004). In this case, both parties seem to agree that if the evidence found in Womack's vehicle was properly collected, it was pursuant to the automobile exception to the warrant requirement. "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). Womack does not argue that his station wagon was not readily mobile, but, rather, limits his challenge to an alleged lack of probable cause to believe that it contained contraband. Essentially, Womack contends that a K-9's indication that a vehicle contains contraband, standing alone, is insufficient to establish probable cause.

"Probable cause is 'a fluid concept incapable of precise definition … [that] is to be

---

[4] Womack does not challenge his conviction for resisting law enforcement.

decided based on the facts of each case.'" *Creekmore v. State*, 800 N.E.2d 230, 233 (Ind. Ct. App. 2003) (quoting *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997)). "'Probable cause to search premises is established when a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime.'" *Id*. (quoting *Esquerdo v. State*, 640 N.E.2d 1023, 1029 (Ind. 1994)).

We need not address the precise question of whether a positive K-9 indication, standing alone, constitutes probable cause to search a vehicle, because the authorities had more here. First, Womack did not stop when Deputy Shepherd activated his emergency lights and siren, giving him probable cause to believe that Womack was committing the crime of resisting law enforcement. The fact that Womack did not stop immediately gives rise to an inference that he feared some criminal activity on his part would be discovered if he did. Second, Womack continued his flight on foot once he parked in his driveway by running and ultimately hiding in a woods. Womack's flight on foot after stopping gives rise to an inference that he fled in order to distance himself from contraband in the station wagon. Finally, Corporal Gelbaugh detected the odor of burnt marijuana as he approached the vehicle.

Myers v. State, 839 N.E.2d 1146, 1149 (Ind. 2005), and *Combs v. State*, 851 N.E.2d 1053 (Ind. Ct. App. 2006), *trans. denied*, have similar facts. In *Myers*, when police stopped Myers's vehicle, the officer observed that Myers's hands were shaky, he appeared very nervous, he was speaking rapidly, and he had constricted pupils. *Myers*, 839 N.E.2d at 1148-

49. In addition, the vehicle smelled strongly of cologne. *Id*. After a K-9 sweep indicated the presence of contraband, a warrantless search uncovered methamphetamine. *Id*. at 1149. The Indiana Supreme Court concluded that the search was proper:

> We are persuaded that the positive reaction of the narcotics-detection dog to the exterior of the defendant's vehicle, however, especially in light of the defendant's dilated pupils, his extreme nervousness, and the presence of heavy cologne mist, constituted probable cause for further police investigation regarding the contents of the vehicle's interior.[5]

Id. at 1150.

In *Combs*, Putnam County Sheriff's Deputy Craig Sibbitt received a dispatch of the possible theft of gasoline allegedly committed by a person driving a white Cadillac bearing the license plate number 60A8719. 851 N.E.2d at 1056. After locating and stopping the vehicle, which was being driven by Combs, Deputy Sibbitt approached and noticed that Combs "was leaning sideways in the vehicle and had his arm between his legs underneath the seat" and was "acting paranoid, speaking rapidly, and appeared to have dry mouth[.]" *Id*. Deputy Sibbitt believed that Combs might be under the influence of methamphetamine and soon thereafter also determined that Combs's driver's license had been suspended. *Id*. As Deputy Sibbitt wrote Combs a citation for driving with a suspended license, a K-9 officer walked his K-9 around Combs's car, where it indicated the presence of contraband at the driver's-side front door. *Id*. We concluded that the deputies had probable cause to conduct a warrantless search based on the K-9's indication that the car contained contraband and

Combs's behavior, which indicated that he might be under the influence of methamphetamine. *Id*. at 1061.

Both *Myers* and *Combs* involved positive indications by a drug-detection K-9, suspicious behavior by the driver, and other observations indicating illegal drug use, which, taken together, generated probable cause to believe contraband might be found inside the vehicles in question. Such is the case here. We conclude that the K-9's positive indication, Womack's flight, and the smell of burnt marijuana detected within together gave rise to a reasonable belief that contraband might be found in Womack's vehicle.[6] The trial court did not abuse its discretion in admitting evidence seized as a result of the search of Womack's station wagon.

II. Constructive Possession

Police found no marijuana on Womack's person, so the State was therefore required to prove that he had constructive possession of it, a burden Womack claims the State failed to carry.

> A defendant is in the constructive possession of drugs when the State shows that the defendant has both (i) the intent to maintain dominion and control over the drugs and (ii) the capability to maintain dominion and control over the drugs. *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *on*

---

[5] This holding arguably stands for the proposition that a positive indication by a drug-detection K-9, standing alone, is sufficient to establish probable cause, thereby justifying a warrantless search of an automobile. As previously mentioned, however, there is more here than just a positive indication.

[6] Womack contends that this case is similar to *Wilson v. State*, 847 N.E.2d 1064, 1068 (Ind. Ct. App. 2006), in which this court concluded that the trial court should have granted Wilson's motion to suppress evidence found in his car. *Wilson*, however, is readily distinguishable. The question in *Wilson* was *not* whether the positive results of a K-9 sweep of a vehicle constituted probable cause to search, but whether police had sufficient reasonable suspicion to detain Wilson long enough for the K-9 to arrive.

> *reh'g*, 685 N.E.2d 698 (Ind. 1997). The proof of a possessory interest in the premises on which illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question. *Davenport v. State*, 464 N.E.2d 1302, 1307 (Ind. 1984). In essence the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises. *See id.*; *Martin v. State*, 175 Ind. App. 503, 372 N.E.2d 1194, 1197 (1978) ("[A] house or apartment used as a residence is controlled by the person who lives in it and that person may be found in control of any drugs discovered therein, whether he is the owner, tenant, or merely an invitee."). And this is so whether possession of the premises is exclusive or not.
>
> However, the law takes a different view when applying the intent prong of constructive possession. When a defendant's possession of the premises on which drugs are found is not exclusive, then the inference of intent to maintain dominion and control over the drugs "must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence." *Lampkins*, 682 N.E.2d at 1275. The "additional circumstances" have been shown by various means: (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999).

Gee v. State, 810 N.E.2d 338, 340-41 (Ind. 2004).

Here, Womack's capability to maintain dominion and control over the drugs found in his station wagon may be inferred because of evidence that he was the only person in it. As for Womack's intent to maintain dominion and control, application of the *Gee* factors establishes that he had such intent. Although Womack has never admitted that the marijuana found in his station wagon was his, all other applicable factors seem to point to intent to maintain dominion and control. First, Womack fled, initially in his station wagon and then on foot. Second, two partially burnt marijuana cigarettes were found on the driver's-side

floor in the front of the station wagon and one was found on the seat, all in plain view and in close proximity to Womack as he drove, and more marijuana was found in a cigarette box in the glove compartment, easily within Womack's reach. Finally, the drugs were found in close proximity to Womack's possession, *i.e.*, inside his station wagon, and there is no evidence, other than his testimony, that any other person had been inside the station wagon recently. The State produced sufficient evidence to establish that Womack constructively possessed the marijuana found in his station wagon.

III. Proof that Womack had the Required Number of Prior Controlled Substance Convictions

Womack contends that the State failed to prove that he was the same person who had been charged and convicted of dealing in marijuana in cause number 55D02-9401-CF-8. Another panel of this court recently concluded that "identification evidence need not be unequivocal to be sufficient to support a conviction only when the identification is supported by circumstantial evidence; when such identification is the only evidence, the identification must be unequivocal." *Scott v. State*, 871 N.E.2d 341, 344 (Ind. Ct. App. 2007), *trans. denied*.

Scott, however, does not require reversal here for two reasons. First, Officer Buskirk's testimony that Womack was, in fact, the same person he had arrested in 1994 was unequivocal. When asked if Womack was the same person he had arrested in relation to a prior crime, Officer Buskirk replied, "Yes, sir." Tr. p. 12. Second, Officer Buskirk's testimony was not the only evidence that Womack was the same person convicted in the prior

proceeding. The State introduced Exhibit 22, which included copies of the charging information and judgment of conviction in cause number 55D02-9401-CF-8, which also tended to show that Womack was the subject of the prior conviction. The charging information alleged that "Jerald J. Womack did knowingly deliver marijuana" in Morgan County, and the judgment of conviction indicated that "Jerald J. Womack" pled guilty to Class D felony dealing in marijuana. State's Ex. 22. The State produced sufficient evidence to establish that Womack was the same person convicted of dealing in marijuana in cause number 55D02-9401-CF-8.

IV. Inappropriate Sentence

Womack contends that his nine-year aggregate sentence, which is three years fewer than the maximum he could have received, is inappropriate. At the outset, we wish to emphasize that six years of Womack's nine-year sentence were imposed by virtue of his status as a habitual controlled substance offender and that his convictions for marijuana possession and resisting law enforcement accounted for only three years. Pursuant to Indiana Appellate Rule 7(B), we have the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." We defer to the trial court during appropriateness review, *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007), and we refrain from merely substituting our judgment for that of the trial court. *Foster v. State*, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003), *trans. denied* (2004). The burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848

N.E.2d 1073, 1080 (Ind. 2006).

As for Womack's offenses, it seems to us that they are worse than the typical Class A misdemeanor resisting law enforcement and Class D felony marijuana possession offenses. The flight for which Womack was apparently convicted, *i.e.*, the flight on foot,[7] resulted in his station wagon being left unattended for some time, allowing at least the opportunity for the crime scene to be compromised. Had that happened, the result of his flight might have been to preclude his prosecution for the more serious crime of marijuana possession. Moreover, we believe that Womack's marijuana possession offense was worse than typical because there was some indication that he had been smoking marijuana while driving. Three partially smoked marijuana cigarettes were found in his station wagon, and police detected the odor of burnt marijuana, both of which indicate that Womack had very possibly been smoking marijuana while driving.

As for Womack's character, he has an extensive criminal history, dating back to 1979. Womack has five prior felony convictions (and two other felony convictions that were reversed and remanded for new trials), six prior misdemeanor convictions, has served several terms of incarceration totaling well over ten years, and has collected sixteen other criminal charges that were not reduced to conviction. Although the majority of Womack's convictions have been for nonviolent crimes, mostly involving abuse or possession of alcohol or illegal drugs, he does have prior convictions for felony burglary and Class B misdemeanor

battery. Despite his extensive history of criminal convictions and incarceration, Womack has proven himself unwilling to conform his behavior to societal norms. In light of the nature of his offenses and his character, we conclude that Womack's nine-year aggregate sentence is appropriate.

We affirm the judgment of the trial court.

BARNES, J., and CRONE, J., concur.

[7] During final argument, Womack's trial counsel explained that Womack admitted that he had resisted law enforcement when he ran away, but not when he failed to stop for Deputy Shepherd. As it happened, the jury convicted Womack of Class A misdemeanor resisting law enforcement, which is flight without the use of a vehicle.